LAW REFORM COMMITTEE

Inquiry into administration of justice offences

Sydney – 11 November 2003

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Ms J. Shouldice, Member, Criminal Law Committee, Law Society of New South Wales.

The CHAIR — Thank you for coming along. I should introduce my colleagues: Richard Dalla-Riva and Dianne Hadden, from the upper house in Victoria; and Noel Maughan, who is the deputy chair of the committee and from the Legislative Assembly, as I am. You have met Kristin Giles and Merrin Mason. We are covered by the Parliamentary Committees Act, which means that any evidence that you give is subject to parliamentary privilege, although I imagine it is not covered until we get back to Victoria — we are out of jurisdiction here. However, you will be able to see the transcript of any evidence you give and you will be able to make any alterations to the Hansard record and indicate any parts of your evidence that you would like kept in camera, in which case it will not be published. Otherwise it will be generally available on our web site and in hard copy form. I think you have a list of the questions that have been circulated. Perhaps rather than our repeating the questions, you might start off by talking to the first one which is really a very general question about codification as against the common law and what the advantages and disadvantages are from your point of view. I think you have a strong background in the commonwealth jurisdiction.

Ms SHOULDICE — That is mainly my background. My personal view is I would prefer codification. I think it makes things more certain even if it sometimes can be more difficult. I think it is more certain from an investigative point of view and what the police know they have to look at if they have decided they want to look at someone for perjury, and for the courts. The common law is widely read — judicial interpretation can be much wider, I think, in common law. I could be wrong in that, but that is my feeling. That is my experience as well.

The CHAIR — Is that a disadvantage?

Ms SHOULDICE — It depends if you are the prosecutor or the defendant. It is striking the balance. Can I just say at the outset — and I said it, I think, earlier — I am not saying all of the public, but I do not know if the oath is taken as seriously today as it was 50 years ago. Some people just naturally lie, it is just the way they are. I do not know if that fear of the Lord that the oath was supposed to impart in people is alive and well — not in New South Wales anyway; I do not know about other states. That is where I am coming from. I do not know if having somebody swear makes them actually tell a truth. Having said that, I did have a friend come to me with a statutory declaration once — this is just an anecdote — it did not really need to be sworn but it was to help someone stay in the country and I thought she was telling a few lies in it, so I got the bible out and said we had to do it on the bible. She said, 'I better go away and think about it'. This not a religious girl or someone brought up in religion ,but there are some people; and if you have ever been a witness, when that judge eyeballs you when you go to take the oath ,it would have an effect on some people.

The CHAIR — Back on this question of the advantage of codification, I suppose one of the common arguments against codification is it tends to be a little inflexible in terms of developments in the law and thinking about offences. Do you think that has been reflected at the commonwealth level?

Ms SHOULDICE — No, because ours are codified. I do not know if it is inflexible. We will get to it, but I think the materiality aspect is the more difficult part of a perjury matter.

Ms GILES — Do you have any knowledge of the New South Wales system prior to 1990, when it was not codified?

Ms SHOULDICE — I would have read the case law when I was doing a bit of research for a couple of matters I had early on, but I have not dealt much with New South Wales. I have read the provisions for some research, but I am really looking at the commonwealth matters. If it is inflexible it can be changed. I just think if it is not written down in black and white it makes it more difficult. It is like our conspiracy, which is still not seen as really being codified. That has always been considered a good charge for the police. I do not think they really understand it — they just think if you are there you are in the conspiracy and they all get charged. That seems to be the rule of thumb. Having it put in legislation and having it much more clear provides some sort of guideline.

The CHAIR — What about from the point of view of clients and the system? Is codification easier for them in terms of actually understanding what the law is? Do you think it has had any impact in terms of people's understanding?

Ms SHOULDICE — The defendants you are talking about?

The CHAIR — Defendants in the community understanding what the law is as a result of it being in statute.

Mr MAUGHAN — And the public generally?

Ms SHOULDICE — No, I think they just think if you lie in court you should be prosecuted. I do not think they understand how hard it is.

The CHAIR — And defendants?

Ms SHOULDICE — A defendant would be the same unless they were really in the system. Everybody seems to know what perjury is or has a view on it because the word is quite common, it is not a sophisticated word. I think they think if you lie to the court it is perjury, but, as I said, they do not understand the technical ramifications that go with it and what has to be proved.

The CHAIR — On perjury, you were saying that people know what it means to lie to a court. Do you think nevertheless it is an under-represented offence?

Ms SHOULDICE — There are not that many brought. I have printed off some stats. I cannot give them to you, because they are on our reports. In New South Wales in commonwealth matters we have had about 16 convictions since 1983. There may be a few more that have slipped through the system.

Mr DALLA-RIVA — Are they at trial level, though?

Ms SHOULDICE — Some are dealt with summarily. It seems that in New South Wales they are dealt with summarily, but in Adelaide there are some District Court ones.

Mr MAUGHAN — Is the reason that there are not more the fact that the success rate is low?

Ms SHOULDICE — I do not know. We do not get as many referrals. A lot of the referrals are from the Family Court. The judges find there are false affidavits and false material and in custody cases getting rid of assets that can have a material outcome on things. A lot of them are referred from the court. From there they go to the federal police, who get the brief together and refer them to our office. If there is an offence there — we have to go through the prosecution guidelines, that three-stage process: is there a prima facie case, reasonable prospects and in the public interest. Sometimes we have to really look at that in Family Court matters — we do in every case, but it is particularly relevant there. On the success rate, we usually get up because it is sworn in affidavit — if someone says 'I did not have that house' and it has been spirited away.

Mr MAUGHAN — I am just trying to reconcile the two statements that on the one hand perjury is widespread and on the other prosecutions are relatively low.

Ms SHOULDICE — As I say, the Family Court ones have real, material outcomes for generally the parties to the marriage or the children of the marriage, which is why I think the Family Court judges refer the matters. I have not seen the same level of referrals coming from other courts.

The CHAIR — They just let it go?

Ms SHOULDICE — I think they let it go. I think everyone has just too much to do and there are too many other more pressing things. I do not know the strike rate of lies in courts.

The CHAIR — Probably pretty high.

Ms SHOULDICE — You often sit there in a trial — I have not sat in a trial for a couple of years, not for long periods — where you think, 'They're lying. They're lying'.

Mr DALLA-RIVA — In relation to where a person provides evidence knowing it to be false, on page 14 our notes state:

> In the law relating to perjury, New South Wales and Queensland require that the testimony must be objectively false (that is, actually false). In contrast, pursuant to the common law which applies in Victoria the truth of the statement is no defence to a charge of perjury if the defendant believed it to be false or was reckless as to whether it was true or false.

If we were to codify, it would it mean that we would be limiting the opportunity for bringing perjury cases. If we were to start with a fresh page, would you codify it so that you would have it that the defendant believed it to be false, not that it was actually false, or that he or she was reckless as to whether it was true or false? Or do you think in this context that the number of perjury cases is so small that it really does not matter?

Ms SHOULDICE — I have two views on that. My first view is that they have to know it to be false and believe it to be false, if that is the question you are asking. Whether it is in fact false is a question of materiality — that is what it would go to and lead to. My preference would be for them to know it to be false, to prove knowledge, the actus reus of the offence. I think trying to prove what somebody believed if they believed to it be false is too difficult. You have to really look at the objective facts and what you can objectively prove from other evidence.

Mr DALLA-RIVA — That is a good introduction to my next question. On the offence of perjury, say you have in the dock an accused who is charged with murder, for example, and he decides that he will give sworn evidence and you know that evidence to be totally false, just by the facts that have been presented. It is subsequently brought by the jury that the person is acquitted. There are probably two prongs to this question. Given that you know it to be false and, as you said, the materiality, do you see it as appropriate — given your statement before — that a person such as that be acquitted on the false evidence that you know to be false? Secondly, and this is an issue that was brought up in my local groups, on the charge of perjury brought against the accused who is acquitted of the murder charge, do you see that as an appropriate course — in other words, the double jeopardy in a roundabout way?

Ms SHOULDICE — They are public policy issues you are asking about, really. I have had one trial where there was a hung jury twice for a fellow and they brought perjury between the first and second hung jury. The police submitted a perjury brief, but it was to do with a bail application in the Supreme Court much earlier. The judge found it was not material, so it did not go on before the jury. I was not involved in laying that charge. I see it as a payback. If the fellow is acquitted of perjury, I do not know on public policy — it is really difficult to say whether you should be prosecuting everybody in those circumstances.

Mr DALLA-RIVA — If the person were acquitted of murder?

Ms SHOULDICE — If he is acquitted of murder, then you bring the perjury charge later because he is acquitted of murder because of the lies he told in the trial — is what you are saying?

Mr DALLA-RIVA — Yes. Your view is that that should not be the case?

Ms SHOULDICE — I am not saying it should not be the case, but I think that public perceptions are that you are only doing that because he walked, because he was acquitted, because there are so many other people who are telling lies in criminal trials — defendants, and in particular accused who are not prosecuted. I think that if you made it like that you would be leaving it open for arbitrary prosecutions. You need some sort of consistency in how you prosecute people. It all depends on the facts of the case; every case is dealt with separately. Can you see the dangers of it?

Mr DALLA-RIVA — No. I am just listening to what people are saying; that is why I am asking your views on it.

The CHAIR — The low level of prosecutions tends to indicate it would not happen very often, if ever.

Ms SHOULDICE — It rarely happens following a criminal trial in commonwealth matters. I do not know about the New South Wales jurisdiction, but you do not hear of so many perjury cases from the evidence given in trials.

Mr MAUGHAN — Can I put the other side of it? It seems to me that if we are not prosecuting for perjury in the theoretical case we have just been talking about — we are not then going to pursue somebody for perjury — we are lessening the pressure on people to tell the truth in front of the court and to that degree are weakening our whole justice system. Therefore I guess I am arguing that perjury should be a very serious offence and we should prosecute far more than we do. Following on from that, I agree with your earlier comments about the oath. Have you got any view on how we can have some sort of an affirmation — whatever it might be — to encourage people to be more truthful than they are, because they have not got much regard for the present oath and the need therefore to tell the truth because of divine retribution, given that we are now a multicultural society?

Ms SHOULDICE — I think the only way to do it is if you see it as a significant problem within the justice system, you have to bring enough prosecutions as a deterrent; so you are looking at deterrence. That is a policy issue that would have to be made. What I was saying to Richard is you would not do it in just the odd murder case where somebody was acquitted — you would want some sort of guidelines with your Director of Public Prosecutions across the board where in appropriate cases they are brought, not just one if it was a particularly nasty criminal offence in a country town, where it would be seen as payback and unfair.

Mr MAUGHAN — I take your point.

The CHAIR — I think Noel's question also goes to this point about whether or not there should be an express warning to any witness in relation to the fact that if they perjure themselves it is a criminal offence and they are liable for prosecution. Is that something that is routinely done by the judges at the commonwealth level?

Ms SHOULDICE — No, we follow state procedure and they just take the normal oath. Where you get it is when counsel says, 'Well, you know that telling lies is perjury.'

Ms GILES — Or the judge.

Ms SHOULDICE — You get that often going on.

The CHAIR — Do you think there should be, as a matter of routine, the judge reminding the witness that in fact it is criminal offence?

Ms SHOULDICE — It would not be a bad idea. They do it in some of the other hearings — in National Crime Authority type-hearings they are warned about it. You can bring it to people's attention. I think they know, but they also know that hardly anybody gets prosecuted.

Mr DALLA-RIVA — I was going to ask about that. Earlier you mentioned the low number of convictions for perjury; what were some of the sentences, so we can get a rough idea of the penalties?

Ms SHOULDICE — Depending on the lie. I have one here which was a summary matter and he got eight months and was to be released after six months. That was false testimony during Family Court proceedings. Another one, six months jail; six months jail; periodic detention for three years; sentenced to a fixed term.

Ms HADDEN — Was that a Family Court matter?

Ms SHOULDICE — This was another Family Court matter.

Ms HADDEN — Are they mainly perjury convictions arising out of the Family Court jurisdiction?

Ms SHOULDICE — Dianne, I think what I am saying is going through the list and looking at the kinds of offences we prosecute in the commonwealth there are a significant number of referrals — they are overrepresented here — for perjury.

Mr DALLA-RIVA — Because of the nature of your work, because it is commonwealth?

Ms SHOULDICE — Yes, but what I am saying is —

Mr DALLA-RIVA — But they have all been sentenced to a term of imprisonment.

Ms SHOULDICE — Not all of them — some of them get a bond, some of them get a fine.

Mr DALLA-RIVA — What proportion would have got a term of imprisonment, roughly?

Ms SHOULDICE — I am just going — —

Mr DALLA-RIVA — Is that something we can get?

Ms SHOULDICE — More than 50 per cent on some of these.

The CHAIR — But 50 per cent of 16 cases in 20 years.

Ms SHOULDICE — There could be a few more than this and there would be others that we have prosecuted. These are only the convictions and there may be others that I did not quite pick up on the system; the data is not entered correctly.

Ms HADDEN — It depends on the lie that is told.

Ms SHOULDICE — It does not say. It just seems to be that there are quite a significant number of referrals from the Family Court.

Ms HADDEN — Which is probably an easier jurisdiction to pick a lie.

Ms SHOULDICE — Because it is sworn in an affidavit.

The CHAIR — Just in terms of statements in irreconcilable conflict, where in New South Wales and Queensland if you make two statements one of which must be false but it is not known which one, there is the capacity to prosecute for perjury. Does that exist at the commonwealth level?

Ms SHOULDICE — No, it does not.

The CHAIR — Should it? Do you think it is useful?

Ms SHOULDICE — I do not think just two irreconcilable statements in conflict on their own would be sufficient for a commonwealth offence.

The CHAIR — Would they not?

Ms SHOULDICE — No. We would need to prove that one was a lie.

Ms HADDEN — You have to prove that one was a lie, but not both.

The CHAIR — Due to the bells ringing in the background, for the purposes of the record we might just go back over that question. In New South Wales and Queensland you are able to be charged with perjury where there are two statements in irreconcilable conflict, but it is not known which of the statements is false. Is that something that occurs at the commonwealth level?

Ms SHOULDICE — No, it does not. You would have to prove that one was untrue — you would have to prove the lie.

The CHAIR — So on its own it is not sufficient, just the fact that there are two statements in conflict.

Ms SHOULDICE — It is not sufficient in commonwealth law — that will not prove the offence. Secondly, given that there is a criminal sanction, I do not think it is a great idea. On the other side it would save investigation if you thought it was a real lie and maybe materiality would come into play when you looked at it.

Mr MAUGHAN — Does that not also come back again to my point of taking the legal system seriously? If you have proven that somebody quite deliberately made one or other false statements it does not seem to me to matter which one it is because they have attempted to mislead the court. Is that not a very serious offence?

Ms SHOULDICE — But you have to prove that they knew they were making a false statement. You then have to look at their subjective intent and you are still getting into the mens rea of what they are doing.

Mr DALLA-RIVA — You initial statement was that you view codification as 'better', or similar words. If even with codification it is still difficult to establish the mens rea and the offence and all the issues, why would Victoria then goes towards codifying the law if it is no different in terms of the numbers of prosecutions, even though there are few. In other words, are we codifying something that does not necessarily need to be there? That is what I am asking. Should we be looking at codifying something that would be more relevant or would be able to be adapted easier? You have obviously been through the book and may have seen certain things that you believe are right or would work better if they were codified.

We seem to be stuck, Chair, on the issue of perjury. I know it is your interest, but it seems to me that the arguments for codifying it, in my view, have not been established as much as I thought they would be. In fact it is quite good to have you here because I thought there would be this revelation that perjury in operation is wonderful and very clear. I do not have that view at this stage.

Ms SHOULDICE — Without disparaging judicial officers, I think a lot of them do not take it seriously. They think, 'Oh, everyone lies'. That is what I think. Some of them do not take it seriously if you bring a perjury charge. They think there is much more pressing business on the court.

Mr DALLA-RIVA — The crime that is already before the court?

Ms SHOULDICE — Yes, the real crime. There is that. The main difficulty I have had in perjury matters is proving materiality.

Mr DALLA-RIVA — What would you define materiality as, in your words?

Ms SHOULDICE — There are definitions.

Mr DALLA-RIVA — I am sure there are, but how would you define it?

Ms SHOULDICE — The best thing I can do is go to the case law. It has been set out in this section:

> Material, if it is of such a nature as in any way to affect directly or indirectly the probability of evidence to be determined by the proceeding, must not only be relevant but practically relevant.
>
> A statement of only remote or theoretical relevance may not be material.

Can I just give an example? In a Family Court matter the husband swears an affidavit saying, 'I've only got this house' — the matrimonial home. He has spirited away a whole lot of other assets. They do a family settlement, and if the wife gets 60 per cent of the home or 40 per cent of the home she is living quite poor, but he has effective control of millions of dollars worth of other assets. If you can prove that, that has materially affected the outcome in the case. It is quite easy to see that.

In another matter we had, for example, the judge said it was not relevant. We had a completely troublesome defendant. He was one of those particular people you could never get before the court — he always had an argument, suing the Attorney-General and bringing actions against the director in the state. He said he had lost the brief. We had been trying to serve a brief on him on numerous occasions. He said, 'I never ever received this brief of evidence'. He was asked to get in the witness box and give that on oath because he had been mucking up the proceedings for a significant number of months. We were able to prove that he did in fact receive it. He went to trial on the main substantive fraud allegation charge and he was convicted. Then we ran the perjury charges because the police thought it was so serious that the brief was put together. The judge pulled the plug. We received a no bill application. We decided we needed to still push it ahead because of the amount of time spent and trouble that had been caused, and the judge, in the middle of the trial, directed a verdict. I think he directed the verdict because, he said, 'He wasn't warned when he gave that evidence in the Local Court'. Not that he was not warned — he took the oath — but because he was not represented he was not warned that he did not have to give the evidence. It was the fact that he was compelled to give this evidence in the Local Court. I am not going to say who the judge is. All I am saying is he just did not want us to run that case. He just thought it was rubbish.

Ms HADDEN — Because you got your conviction, you should have been happy with that?

Ms SHOULDICE — I get that sort of feeling.

The CHAIR — So it is almost seen as a lesser criminal offence to the material?

Ms SHOULDICE — Yes. I still think some of the judges think the lie is significant at the time. They do not like lying. But I think they feel like you are wasting their time bringing these perjury matters — what they consider unimportant issues. Family Court matters might be different. They can see a real victim.

The CHAIR — How often would a judge intervene in a case and reissue the warning?

Ms SHOULDICE — In a trial? I have no idea. I would only be guessing. If you go out of the witness box at morning tea and you come back and you are a witness, you are still under oath — the oath still applies. They will generally say that — to lay witnesses in particular they will always say that and, 'Don't talk about your evidence', as they leave the box. But as far as saying 'Don't tell lies' is concerned, I do not know how often they say it. It is often counsel that says, 'You're telling a lie here. There's perjury'. You will often get that through a trial, particularly if they say it to the police or one of the rollover witnesses, the people assisting the police.

The CHAIR — If we deal quickly with the false accusation of an offence and the conspiracies to make false accusations of offences. In your experience how does that work under the commonwealth Crimes Act?

Ms SHOULDICE — I have never been involved in it. I cannot even remember a case at work. I could have looked it up, but I did not go onto the system. Looking at whether an individual could be looked at under the commonwealth, you could go at section 36, fabricating evidence. Then you have the very wide 'attempting to pervert justice' or 'conspiracy'. There is a raft of offences in there you could look at, depending on the conduct, under part 3, offences relating to the administration of justice. If it was with the judicial system we would not be limited to this act. It could be that some of the public mischief offences fit under the state Crimes Act. You could possibly look at that as well.

The CHAIR — I think we have covered question 6, because there was that whole question of whether you knowingly or intentionally gave false testimony. The objective falsity of the statement is required to prove a charge of perjury in the commonwealth or New South Wales, whereas in Victoria the truth of the statement is no defence if you in fact thought it was false. What do you think of that as an approach? It is different from the commonwealth approach. Do you have any views about that?

Ms SHOULDICE — I agree with the commonwealth approach.

The CHAIR — Because?

Ms SHOULDICE — I do not think you are going to be able to prove what the defendant believed. You have to have some objective measure. How do you know what he believed, unless you can get independent corroborating evidence to say that at the time he said he believed that he knew he was lying?

The CHAIR — Given the difficulties you have outlined in prosecuting cases for perjury, it probably would make it even more complex to prove that he or she thought it was false even though it was true.

Mr DALLA-RIVA — Do you think it would be better if you had the situation that you legislated that for any oath given in a court or any proceeding there is a warning provided beforehand, that it would then encourage the judiciary to understand the importance of it as well, or do you think we may be overregulating?

Ms SHOULDICE — It may well, but if you have the legislative intent and the will to try and tackle this whole area — as Dianne said, the public are interested in it because they are feeling a little bit let down by the court system in some areas — you would probably have to educate the judiciary and have them on side.

Mr DALLA-RIVA — While it is easy to say, 'We're going to educate judges and magistrates', often you get an adverse reaction from the judiciary. Do you think there is a good methodology in applying it through legislative reform, such that it becomes a very subtle way of re-educating the judiciary? Would you see that as appropriate?

Ms SHOULDICE — Maybe, but it is really re-educating the public. You probably start in schools as well. That is the way people think today. I have certain views on the way the whole system runs. When I was a child, if you got into trouble you took your punishment and got on with it. Now it is, 'Prove it. Prove it'.

Mr DALLA-RIVA — Which is the issue you raised in your anecdote before about the use of the Bible. You had a gut feeling about an issue, as soon as you pressed the Bible matter, all of a sudden the reality of making a false statement was coming through to this person. I just wonder whether through that anecdote you are actually saying that could be applied in the court system, because then it becomes a bit more serious. To a degree, whilst I do not want to suggest otherwise, the judge was probably right in assuming that the fraudster had not been warned about his false evidence, even though we knew it was false.

Ms SHOULDICE — I think I got confused. It was not that he was not warned, it was the fact that he was not given the choice.

Mr DALLA-RIVA — That is what I mean.

Ms SHOULDICE — He was made to get in the box and give the evidence on oath.

Mr DALLA-RIVA — He would have been clearly identified as a suspect or a potential suspect or a potential offender for the offence of perjury. That is the right of every person accused of an offence.

Ms SHOULDICE — It was not that, it was the way the judge looked at it. We do not have time to argue it here but really he basically was saying, 'I do not believe you told me on oath you did not get the brief because I have an affidavit from the prosecutor that says it was served on you.

Mr DALLA-RIVA — One word against the other.

The CHAIR — We have touched a bit on the materiality question but you might want to talk a little bit more about that because in Victoria, under section 315 of the Crimes Act, materiality is not a relevant element of the offence. Basically, all evidence is deemed to be material for the purposes of perjury. Do you have any thoughts on that given how different it is at the commonwealth level?

Ms SHOULDICE — I think it is too wide and I think, as I said before, the main problems are the hurdles to getting material. I think the Victorian section, with that section there, could be used a little bit inappropriately — small lies. There are big lies and there are small lies. The material lies are the big lies, that is where I see it. You have 10-year terms in New South Wales for these offences; we only have 5 years, even though a lot of them are taken to the Local Court so 12 months under common law is the maximum they could be given. If you have that sort of criminal sanction that is where you really need stricter proofs. If it just a summary offence and like a parking ticket or fine — a lesser offence — I would suggest grade them where you did not need to prove materiality and it is just a lie. Perhaps a fine or some sort of sanction but not potentially 5 or 10 years. It is considered a very serious offence.

The CHAIR — Is there a practice that might arise where, particularly in lower courts, no-one gets charged with perjury but the judge takes into account the witness and his truthfulness in the box in determining the sentence?

Ms SHOULDICE — You mean a defendant?

The CHAIR — A defendant.

Ms SHOULDICE — If he was charged with perjury?

The CHAIR — No, if he was not. You were talking about the grading of offences. Let's say you went to the Magistrates Court and you were charged with a traffic offence or some other offence and you did lie and it was obvious that you were lying: do you think the judge might take that into account?

Ms SHOULDICE — All judges on sentence do that. They all say, 'There is no contrition here, you have told that many lies. You have never accepted your responsibility. You have been found guilty and that is it. There is no mitigation for remorse or anything'. That is a sentencing discretion. However, I would not like to see that with a 5-year or a 10-year penalty.

Ms GILES — Can you tell us how you go about proving materiality or how you establish that? You said it is difficult but can you give us an example?

Ms SHOULDICE — You look at what they are trying to prove, just in a general criminal case you look at what it is trying to prove. As I said, the Family Court proceedings are the easiest ones to discuss because the outcome is it affects a woman's property or it might affect an investigation. Someone may, for example, tell a big lie — a witness — and the police have gone off and done a whole lot of investigation. In the middle of the trial they find out it is an absolute lie and the evidence is lost. That is a material lie. They could have gone and got the evidence on day 1 but 18 months later in the middle of the trial — that would be material. You just have to look at what the outcomes are. If you said you did not go out with someone one night or you did not really know someone, it was just a witness you bought an air ticket from or something, that is not material.

Ms GILES — You said you were 21 instead of 30.

Ms SHOULDICE — That is never material. They are the big lies which really do have an effect on the way the case is going.

Mr DALLA-RIVA — Just a question, there were amendments made in Queensland recently relating to changes to the criminal code in relation to retaliation against a judicial officer, juror, witness or family. This follows the issue relating to the Chief Magistrate, Diane Fingleton. I think it is still before the house but are you able to express an opinion and what your view is on codifying a law such that there is that potential to protect witnesses before and during either a criminal or civil proceeding?

The CHAIR — Basically from retaliation.

Mr DALLA-RIVA — Retaliation before a proceeding — —

The CHAIR — In the Fingleton case, because the magistrate gave evidence in a case, I think the Chief Magistrate said, 'You are going to be moved to the back or Nar Nar Goon'.

Ms SHOULDICE — To me that is perverting the course of justice, I do not know if you need a specific offence.

Ms HADDEN — But they do have a specific offence. She was charged with a specific offence under their code.

Mr DALLA-RIVA — You think that should have been brought under — —

Ms SHOULDICE — I do not know. I do not know the particular offence.

Ms HADDEN — It is in here. It is section 315, I think. I was looking at it the other night.

Ms SHOULDICE — We have 'judge or magistrate acting oppressively' or 'when interested'.

Ms GILES — What about section 36A of your act?

Ms SHOULDICE — Section 34, intimidation of witnesses, is general but if you have a look at section 34 — —

Ms HADDEN — It is in your code.

Ms SHOULDICE — I would have thought there was enough to do something against Fingleton under the public service laws or something about that sort of conduct.

Ms GILES — Would it be under section 36A?

Ms SHOULDICE — That is a normal intimidation of witnesses. I thought you were saying there was a specific offence.

Ms HADDEN — I thought she was charged under section 130 of the Criminal Code Act.

Ms GILES — No, she was not. I am just saying would you typically have charged Fingleton if she was in the commonwealth jurisdiction?

Ms HADDEN — There is no maximum term or anything, just imprisonment for one year.

Mr DALLA-RIVA — So you do not have a view either way about the introduction of a new provision such as that? It is titled 'retaliation against a judicial officer, juror, witness or family'.

Ms SHOULDICE — No, I think the commonwealth offence in section 36A that Kristin just pointed out — intimidation of witnesses — is wide enough.

Mr DALLA-RIVA — They did not apply that.

Ms SHOULDICE — That is a commonwealth offence.

Ms HADDEN — Section 36A is in the commonwealth Crimes Act 1914. She was not charged under that.

Ms SHOULDICE — No, she would have been charged under a state offence.

Ms GILES — She was.

Ms SHOULDICE — Which is just a flat one-year imprisonment.

The CHAIR — Are there any other comments you would like to make on codification?

Ms SHOULDICE — Not really. Interestingly enough, can I just mention some inquisitorial bodies we are looking at?

The CHAIR — Yes.

Ms SHOULDICE — We are looking at some of the areas you may have canvassed — for example, somebody brought into, say, the National Crime Authority under compulsion. They are told generally, 'Anything you say here cannot be used against you in evidence unless it is a lie,' basically unless it is false. Then they are going through the hearings and they have the evidence while they are asking the questions and the fellow lies and they will say to them, 'Blah, blah, blah', and then he will tell the truth. If we are looking at doing perjury and those sort of lies, putting the material issue and whether it is material to their investigation aside, can you charge

somebody when they are telling the truth on the second occasion that proves the first lie and they are under a warning? Basically they are given an indemnity. Do you understand how it works?

The CHAIR — If they tell a lie the first time they are given an indemnity — —

Ms HADDEN — They are given an inducement.

Ms SHOULDICE — It is also an inducement. No, the second one is an indemnity. There are inducements going through these transcripts because it is like, 'Well, if you have been telling lies for three days, you are here today and if you tell the truth everything will be all right,' and then they start telling the truth.

Ms HADDEN — It is the first time you have warned them.

Ms SHOULDICE — Now they are induced. However, they are given a general indemnity under the act that anything they say cannot be used in evidence against them except for its falsity. On the second occasion — when they tell the truth — they are still under that indemnity so how can they be prosecuted using just that second statement to prove the first lie?

The CHAIR — They could under the irreconcilable conflict elements of the New South Wales and Queensland legislation.

Ms SHOULDICE — No, not really. You still have an indemnity there.

The CHAIR — It does not apply to the first case, though, does it? If, say, they have already given evidence and then they are given an indemnity, would that extend that?

Ms SHOULDICE — No, they get the indemnity as soon as they walk in the room. They take the oath and are told, 'You have been brought in to answer questions about X inquiry. Anything you say cannot be used against you as evidence in any proceedings save for — —

The CHAIR — That is the second time.

Ms SHOULDICE — No, it is the first time. It is said to them as soon as they sit down and it applies all the way through the hearing. The next day they come back and they tell the truth. The only evidence you have to prove the lie is them telling the truth on the next occasion. Without corroboration you cannot use the second true statement to prove the lie of the first statement. That is in a specific inquisitorial context.

Mr DALLA-RIVA — It is similar to what happened at the National Crime Authority when I was an investigator. You are right, it is on a par — just for clarification of the record. Whilst I cannot talk about any case specifically it is very similar to a police investigation, where you would ask a question, the suspect would lie outright, then of course you would present the evidence and they would look around the room and say, 'I haven't really been telling you the truth, Officer'. The difference, of course, is that when you are interrogating a suspect they are not under any oath, whereas in the NCA, or the body now, they are required to swear and of course are warned. From my memory of it, it was like an interrogation. I equate it to a public interrogation that was being recorded where the suspect was interrogated to try and find the truth. I would probably find it very difficult to bring a perjury charge when you are going through an inquisitorial process. These are very serious offences, often involving drug trafficking or murder — very complex crimes. My personal view is there no connection to perjury in those circumstances.

The CHAIR — Are there other comments you want to make?

Ms SHOULDICE — No, not really. I have found the process interesting. I will keep my eye on your legislation.

Ms GILES — We will send you a copy of our report.

Ms SHOULDICE — I did not mean to disparage New South Wales judges — I think they work really hard — but I just get the feeling that in the general run-of-the-mill case it is not going to be taken seriously.

The CHAIR — I think we need to check how many cases there are in Victoria where they have been taken seriously.

Mr DALLA-RIVA — We have the problem, I think from my memory of one of our discussions, that we cannot bring up any figures like that.

Ms GILES — We can bring up a few for perjury; they are in the discussion paper. I do not think they are as thorough as in New South Wales, from what I can gather. Certainly not for our other offences.

Mr DALLA-RIVA — Yes, the multitude of other administration offences.

Ms SHOULDICE — I could possibly go through our head office and get more accurate stats. These are what I printed off our system. They are relatively accurate but there are a few more — there may be a few that have fallen through.

Ms GILES — Could you do that?

Ms SHOULDICE — Yes.

Mr DALLA-RIVA — If we could get a detailed analysis?

The CHAIR — Yes, that would be good.

Mr DALLA-RIVA — Not for you to do, but so that we can get some idea of the types of imprisonment and how they are dealt with, whether summarily or by trial. I am interested in that as well.

Ms SHOULDICE — I think there is always an election. In the New South Wales legislation it is a table 1 offence, which means it can be dealt with summarily unless they elect to go to trial.

The CHAIR — Thank you very much, Julie, for coming in. We appreciate your time.

Ms SHOULDICE — I hope I have been of some assistance. I have read the law society paper, but because they are mainly defence lawyers they have a different view.

Ms HADDEN — You are a prosecutor.

Ms SHOULDICE — Yes; not different, but the defence strike a balance; and I do not think I was pro prosecution — I hope not, anyway.

Witness withdrew.